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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OLIVIA FRANCES MAGANA,) NO. CV 12-05275-MAN
Plaintiff,)
v.) MEMORANDUM OPINION
CAROLYN W. COLVIN,¹)
Acting Commissioner of Social)
Security,) AND ORDER
Defendant.)

Plaintiff filed a Complaint on June 22, 2012, seeking review of the denial of plaintiff's application for a period of disability and disability insurance benefits ("DIB"). On July 24, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on April 15, 2013, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 payment of benefits or, alternatively, for further administrative
2 proceedings; and the Commissioner requests that her decision be affirmed
3 or, alternatively, remanded for further administrative proceedings.

4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

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7 On June 4, 2009, plaintiff filed an application for a period of
8 disability and DIB. (Administrative Record ("A.R.") 14.) Plaintiff
9 claims to have been disabled since June 9, 2008, due to fibromyalgia,
10 diabetes, high blood pressure and cholesterol, heart and vision
11 problems, shortness of breath, and "forgetting things." (A.R. 36, 57,
12 64, 166.) Plaintiff has past relevant work experience as a secretary.
13 (A.R. 20.)

14

15 After the Commissioner denied plaintiff's claim initially and upon
16 reconsideration (A.R. 14, 57-61, 64-68), plaintiff requested a hearing
17 (A.R. 69). On April 13, 2011, plaintiff, who was represented by
18 counsel, appeared and testified at a hearing before Administrative Law
19 Judge Sally C. Reason (the "ALJ"). (A.R. 14, 31-50.) Vocational expert
20 Lynn Tracy also testified. (*Id.*) On April 21, 2011, the ALJ denied
21 plaintiff's claim (A.R. 14-20), and the Appeals Council subsequently
22 denied plaintiff's request for review of the ALJ's decision (A.R. 1-3).
23 That decision is now at issue in this action.

24

25 **SUMMARY OF ADMINISTRATIVE DECISION**

26

27 The ALJ found that plaintiff meets the insured status requirements
28 of the Social Security Act through December 31, 2013, and has not

1 engaged in substantial gainful activity since June 9, 2008, the alleged
 2 onset date of her disability. (A.R. 16.) The ALJ determined that
 3 plaintiff has the severe impairments of: "ischemic heart disease status
 4 post stenting in May 2007; diabetes mellitus; mild lumbar degenerative
 5 disc disease; and obesity."² (*Id.*) After considering plaintiff's
 6 impairments, the ALJ concluded that plaintiff does not have an
 7 impairment or combination of impairments that meets or medically equals
 8 one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix
 9 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526). (A.R. 17.)

10
 11 After reviewing the record, the ALJ determined that plaintiff has
 12 the residual functional capacity ("RFC") to perform the full range of
 13 light work as defined in 20 C.F.R. § 404.1567(b). (A.R. 17.) Further,
 14 the ALJ found that plaintiff is capable of performing her past relevant
 15 work as a secretary, because that work "does not require the performance
 16 of work-related activities precluded by [plaintiff]'s [RFC]." (A.R.
 17 20.) Accordingly, the ALJ concluded that "[plaintiff] has not been
 18 under a disability, as defined in the Social Security Act, from June 9,
 19 2008, through the date of [her] decision." (*Id.*)

20
 21 **STANDARD OF REVIEW**

22
 23 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's

24
 25 ² The ALJ did not find plaintiff's visual impairment to be
 26 severe. (A.R. 16.) Further, the ALJ found no medical evidence to
 27 corroborate plaintiff's claim that she was limited by fibromyalgia.
 28 (*Id.*) Specifically, the ALJ noted that there is "no indication
 [plaintiff] has been either evaluated for, or diagnosed with,
 fibromyalgia," and "[plaintiff] has not alleged or otherwise reported
 having fibromyalgia since mentioning it in connection with her
 application." (A.R. 16-17.)

1 decision to determine whether it is free from legal error and supported
2 by substantial evidence in the record as a whole. Orn v. Astrue, 495
3 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
4 evidence as a reasonable mind might accept as adequate to support a
5 conclusion.'" *Id.* (citation omitted). The "evidence must be more than
6 a mere scintilla but not necessarily a preponderance." Connett v.
7 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
8 record can constitute substantial evidence, only those 'reasonably drawn
9 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
10 1066 (9th Cir. 2006)(citation omitted).

11

12 Although this Court cannot substitute its discretion for that of
13 the Commissioner, the Court nonetheless must review the record as a
14 whole, "weighing both the evidence that supports and the evidence that
15 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
16 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); *see also*
17 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
18 responsible for determining credibility, resolving conflicts in medical
19 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
20 1035, 1039 (9th Cir. 1995).

21

22 The Court will uphold the Commissioner's decision when the evidence
23 is susceptible to more than one rational interpretation. Burch v.
24 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
25 review only the reasons stated by the ALJ in his decision "and may not
26 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
27 at 630; *see also* Connett, 340 F.3d at 874. The Court will not reverse
28 the Commissioner's decision if it is based on harmless error, which

1 exists only when it is "clear from the record that an ALJ's error was
2 'inconsequential to the ultimate nondisability determination.'" Robbins
3 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
4 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
5 at 679.

6

7 **DISCUSSION**

8

9 Plaintiff claims the ALJ erred by not considering plaintiff's
10 subjective symptom testimony properly. (Joint Stipulation ("Joint
11 Stip.") at 4-12, 19-20.)

12

13 Once a disability claimant produces objective medical evidence of
14 an underlying impairment that is reasonably likely to be the source of
15 claimant's subjective symptom(s), all subjective testimony as to the
16 severity of the symptoms must be considered. Moisa v. Barnhart, 367
17 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 346
18 (9th Cir. 1991); see also 20 C.F.R. § 404.1529(a) (explaining how pain
19 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of
20 malingering based on affirmative evidence thereof, he or she may only
21 find an applicant not credible by making specific findings as to
22 credibility and stating clear and convincing reasons for
23 each." Robbins, 466 F.3d at 883. The factors to be considered in
24 weighing a claimant's credibility include: (1) the claimant's
25 reputation for truthfulness; (2) inconsistencies either in the
26 claimant's testimony or between the claimant's testimony and her
27 conduct; (3) the claimant's daily activities; (4) the claimant's work
28 record; and (5) testimony from physicians and third parties concerning

1 the nature, severity, and effect of the symptoms of which the claimant
2 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
3 2002); see also 20 C.F.R. § 404.1529(c).

4

5 An ALJ may not rely on a claimant's daily activities to support an
6 adverse credibility determination when those activities do not:
7 (1) contradict claimant's other testimony; or (2) meet the threshold for
8 transferable work skills. See Orn, 495 F.3d at 639. As the Ninth
9 Circuit has explained, "daily activities may be grounds for an adverse
10 credibility finding 'if a claimant is able to spend a substantial part
11 of his day engaged in pursuits involving the performance of physical
12 functions that are transferrable to a work setting.'" *Id.* (citation
13 omitted). A claimant need not be "utterly incapacitated to be eligible
14 for benefits . . . and many home activities are not easily transferable
15 to what may be the more grueling environment of the workplace, where it
16 might be impossible to periodically rest or take medication." Fair v.
17 Bowen, 885 F.2d 597, 602 (9th Cir. 1989).

18

19 As noted *supra*, the ALJ found that plaintiff has the severe
20 impairments of: "ischemic heart diseases status post stenting in May
21 2007; diabetes mellitus; mild lumbar degenerative disc disease; and
22 obesity." (A.R. 16.) The ALJ also found that "[plaintiff]'s medically
23 determinable impairments could reasonably be expected to cause the
24 alleged symptoms." (A.R. 17.) Further, the ALJ cited no evidence of
25 malingering by plaintiff. Accordingly, the ALJ's reason for
26 discrediting plaintiff's subjective complaints must be clear and
27 convincing.

1 In her decision, the ALJ found that "[plaintiff]"s statements
2 concerning the intensity, persistence and limiting effects of [her]
3 symptoms are not credible to the extent they are inconsistent with [the]
4 ALJ's RFC assessment for plaintiff." (A.R. 17.) Specifically, the ALJ
5 found plaintiff to be not credible, because: (1) the medical evidence
6 does not support plaintiff's allegations of totally disabling
7 limitations; (2) plaintiff made various inconsistent statements;
8 (3) plaintiff's treatment has been routine and/or conservative in
9 nature; and (4) plaintiff's daily activities "are not limited to the
10 extent one would expect, given [her] complaints of disabling symptoms
11 and limitations." (A.R. 17-19.)

12

13 The ALJ noted that "the medical evidence of record does not show
14 laboratory or clinical findings which would support finding that
15 [plaintiff] has been unable to work since June 2008." (A.R. 17-18.)
16 The ALJ cited medical evidence that "[a]fter cardiac stenting in May
17 2007, [plaintiff] . . . had 0% residual stenosis," and "a post-operative
18 stress ECHO performed in October 2007 was described as 'normal' (showing
19 no new wall motion abnormality with exercise, and a left ventricular
20 ejection fraction of 60%)." (A.R. 18.) In addition, the ALJ noted
21 that, "although [plaintiff] reported a number of subjective complaints,
22 including back pain with radiation to the left leg, and pain and
23 numbness in the left leg," to consultative internist John Sedgh, M.D.,
24 "[plaintiff] exhibited few objective signs of impairment on clinical
25 examination" during a September 2009 examination. (*Id.*) In fact, Dr.
26 Sedgh opined that plaintiff was capable of performing medium work.
27 (*Id.*) Further, as the ALJ properly emphasized, "the record does not
28 contain any other opinion from a treating or examining physician

1 indicating that [plaintiff] is disabled or even has limitations greater
2 than those determined [by the ALJ]." (A.R. 20); Moncada v. Chater, 60
3 F.3d 521, 523 (9th Cir. 1995)(noting that an ALJ may consider a
4 physician's opinion that plaintiff could work, which contradicts
5 plaintiff's assertion to the contrary, in determining credibility).
6 Thus, although a lack of medical evidence cannot form the sole basis for
7 discounting plaintiff's pain testimony, it is a factor that the ALJ can,
8 and properly did, consider in her credibility analysis. Burch, 400 F.3d
9 at 681.

10
11 The ALJ also discredited plaintiff, because she made various
12 inconsistent statements. For example, the ALJ found plaintiff to be not
13 credible, because "[plaintiff] testified that she stopped working in
14 June 2008 because she underwent stenting, [but] the medical records
15 . . . show the stenting occurred in May 2007." (A.R. 18.) Contrary to
16 the ALJ's characterization, plaintiff's actual testimony was that she
17 stopped working, because "[she] had a stent, and [she] was having
18 difficulties. [She] was having shortness of breath and [she] couldn't
19 function, [she] couldn't see right." (A.R. 36.) Indeed, plaintiff
20 acknowledged at the administrative hearing that the stenting occurred
21 one year prior to her disability onset date. (*Id.*) Rather than
22 attributing her disability onset to her stenting procedure, plaintiff
23 appears to attribute it to complications arising from the stenting and
24 her other impairments.

25
26 Critically, however, "[c]ontrary to her testimony, the record
27 indicates [plaintiff] actually stopped working in June 2008 not because
28 of the allegedly disabling impairments, but rather due to a business-

1 related layoff." (A.R. 18.) As the ALJ properly noted, while plaintiff
 2 testified that she stopped working as a result of her impairments, she
 3 also testified, and admitted elsewhere in the record, that she stopped
 4 working in June 2008, because she was laid off. (A.R. 42, 166.) When
 5 a claimant's work history undercuts her assertions, the ALJ may rely on
 6 that contradiction to discredit the claimant. See Bruton v. Massanari,
 7 268 F.3d 824, 828 (9th Cir. 2001)(holding that the ALJ properly
 8 considered the fact that claimant stopped working because "he was laid
 9 off, rather than because he was injured"). Thus, this contradiction
 10 constitutes a clear and convincing reason for discrediting plaintiff.

11
 12 The ALJ also discredited plaintiff, because plaintiff "indicated
 13 that after being laid off, she collected unemployment benefits and
 14 looked for work for about a year." (A.R. 18.) The ALJ noted that
 15 plaintiff "indicated that she was primarily looking for work in medical
 16 offices, and that she was specifically trying to find a job similar to
 17 the one she had been performing." (*Id.*) The ALJ asserted that "[t]his
 18 raises additional questions as to whether [plaintiff]'s continuing
 19 unemployment is actually due to her medical impairments, as opposed to
 20 non-medical factors." (A.R. 18-19.) As the ALJ properly noted,
 21 plaintiff testified at the administrative hearing that she was receiving
 22 unemployment benefits while looking for secretarial jobs and "maybe"
 23 could have performed a secretarial job similar to the one she had
 24 previously if she did not have to get up or lift much in the way of
 25 weight. (A.R. 43.)³ Accordingly, because plaintiff held herself out as

27 ³ Plaintiff testified, however, that as of the fall of 2009, she
 28 did not believe that she could perform such a job, because her condition
 had worsened. (A.R. 43.)

1 able to work for at least a year after she was laid off in June 2008,
 2 plaintiff's assertion that she became disabled in June 2008, is not
 3 credible. See Carmickle v. Comm'r Soc. Sec. Admin., 533 F.3d 1155,
 4 1161-62 (9th Cir. 2009)(noting that receipt of unemployment benefits can
 5 be a basis to discredit a claimant when he holds himself out as able to
 6 work). Accordingly, the ALJ properly discredited plaintiff's testimony
 7 regarding the date on which she became disabled, based on her receipt of
 8 unemployment benefits.

9
 10 The ALJ also found plaintiff to be not credible, because
 11 plaintiff's description of her limitations throughout the record have
 12 been "inconsistent and unpersuasive." (A.R. 19.) For, example, the ALJ
 13 noted that "while alleging an inability to sit for more than 15 minutes
 14 at a time, [plaintiff] simultaneously acknowledged that she is able to
 15 drive, which obviously involves sitting, for 45 minutes at a time."
 16 (*Id.*) Plaintiff contends that her two statements are not contradictory,
 17 because the statements were made two years apart, and her condition had
 18 "deteriorated" in the interim. (Joint Stip. at 10.) However, prior to
 19 the hearing date, plaintiff, in a form completed in June or July 2009,⁴
 20 which was cited by the ALJ, stated that she could not sit for more than
 21 15 minutes at a time. (A.R. 169.) Thus, her July 23, 2009 statement
 22 that she could drive for 45 minutes clearly contradicts her June or July
 23 2009 statement that she could sit for only 15 minutes at a time. (A.R.
 24 175.) Thus, this contradiction provided another clear and convincing
 25 reason for discounting plaintiff's credibility.

26
 27 ⁴ Although the form is undated, plaintiff noted that the date of
 28 her last outpatient visit was June 2009, and her next appointment was
 scheduled for July 2009.

1 The ALJ also reasonably found plaintiff's testimony that she
2 "cannot lift anything" to be inconsistent with her "acknowledg[ment]
3 that she carries a purse, and . . . is able to lift/carry a grocery
4 bag(s) as well as various household items." (A.R. 19.) At the
5 administrative hearing, plaintiff testified that she cannot lift
6 anything, because she has "numbness and tingling in [her] hands." (A.R.
7 45.) However, when asked if she could carry a purse, plaintiff replied,
8 "Oh, yeah, I put it over my neck, yes." (*Id.*) When asked "how much
9 weight [she] could handle," plaintiff replied, "[1]ike five pounds."
10 (*Id.*) Accordingly, plaintiff's testimony that she can lift/carry
11 various household items and grocery bags is somewhat inconsistent with
12 her testimony that she "cannot lift anything."

13

14 Next, the ALJ discredited plaintiff's pain allegations, because
15 plaintiff's treatment for her allegedly disabling impairments "has been
16 essentially routine and/or conservative in nature." (A.R. 19.)
17 Specifically, the ALJ noted that plaintiff "has made only relatively
18 infrequent trips to the doctor" notwithstanding her allegedly disabling
19 symptoms. (*Id.*) An ALJ may consider evidence of conservative and/or
20 infrequent treatment as a basis for discounting a claimant's
21 credibility. *See, e.g., Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir.
22 2007) (noting that evidence of conservative treatment is sufficient to
23 discount a claimant's testimony regarding severity of impairment);
24 *Moncada*, 60 F.3d at 524 (allegations of disabling pain can be
25 discredited by evidence of infrequent medical treatment). Plaintiff
26 asserts that "[she] took the measures expected for an individual in her
27 condition" and "still endured symptoms of neuropathy until at least
28 February 2011"; "[she] should not be expected to undergo surgery or any

1 other invasive procedure when the procedures will not help her
 2 condition." (Joint Stip. at 10.) While plaintiff need not undergo
 3 unnecessary procedures, the medical records support the ALJ's reasoning.
 4 For example, although plaintiff complained that her neuropathy worsened
 5 in March 2010 (Joint Stip. at 6), plaintiff made very few visits to her
 6 doctor for the treatment of her neuropathy. Indeed, the majority of
 7 plaintiff's medical records after March 2010, reflect treatment for
 8 other conditions and/or note that plaintiff's pain was "0/10."⁵
 9 Plaintiff's infrequent/conservative treatment, thus, weighs against her
 10 claims of disabling symptoms.

11
 12 Lastly, the ALJ discredited plaintiff, because her "daily
 13 activities . . . are not limited to the extent one would expect, given
 14 [her] complaints of disabling symptoms and limitations." (A.R. 19.) In
 15 his decision, the ALJ noted that:

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 17 ⁵ See, e.g., A.R. 401 - 3/26/10 ("[plaintiff] here for [follow-up] lab results"; plaintiff complains of "mild intermittent chest pain x 2 months, asymptomatic at this time" and mild shortness of breath; "No pain 0/10"); A.R. 404 - 4/9/10 (plaintiff here for follow-up; "[plaintiff] states feeling well, no chest pain or [shortness of breath], no polydipsia or polyuria, no peripheral edema"; "No pain 0/10"); A.R. 407 - 5/10/10 (plaintiff's chief complaint is "gastrointestinal bloating/flatus . . . with heartburn, loose stool, [and] abd[ominal] discomfort"); A.R. 411 - 6/24/13 (plaintiff complains of "[shortness of breath on exertion x 1 1/2 mos. when standing up, pain on her neck & squeezing pain on l[ef]t side of chest radiating to the back, l[ef]t arm & numbness on and off"); A.R. 414 - 7/8/13 (plaintiff complains of "burning stomach for 1 y[ear]"; "pepcid does not help much"; "no vomiting"; "denie[s] [chest pain]/[shortness of breath]/palpitation/dizzy"; "non[-]compliant to diet and exercise"); A.R. 418 - 7/27/10 ("[plaintiff] seen . . . for treatment of H Pylori"); A.R. 421-22 - 11/04/10 (plaintiff complains of "dizziness, nausea, [and] vomiting off and on for 3 days"; "No pain 0/10"); A.R. 426 - 12/06/10 ("[plaintiff's] stomach is much better now, occasionally gassy, no nausea/vomiting/blood in stool"; "left shoulder pain for 6 months off and on"; "left hip pain for 3 weeks"; "can walk, no weakness, no numbness").

1 In July 2009, [plaintiff] reported she regularly drives, goes
2 shopping, and does house work, including mopping, vacuuming
3 cooking, cleaning, doing the dishes, and washing clothes
4 At the hearing, [plaintiff] described daily
5 activities which are considerably more limited . . . ;
6 however, two factors weigh against considering the testimony
7 in this regard to be strong evidence in favor of finding
8 [plaintiff] to be disabled. First, allegedly limited daily
9 activities cannot be objectively verified with any reasonable
10 degree of certainty. Second, even if [plaintiff]'s daily
11 activities are currently as limited, it is difficult to
12 attribute that degree of limitation to [plaintiff]'s medical
13 condition, as opposed to other reasons, in view of the
14 relatively weak medical evidence and other factors discussed
15 in this decision. Overall [plaintiff]'s allegedly limited
16 daily activities are considered to be outweighed by other
17 factors discussed in this decision.

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19 (Id.; internal citations omitted.)

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21 As an initial matter, the ALJ's description of plaintiff's daily
22 activities is incomplete and misleading. Significantly, the ALJ failed
23 to include plaintiff's statement that after performing 30-45 minutes of
24 daily activities, she must take a break for "1 hr - 1 1/2 hrs and then
25 start again." (A.R. 174.) Further, while acknowledging that plaintiff
26 described more limited daily activities at the administrative hearing,
27 the factors upon which the ALJ relied in discounting plaintiff's
28 testimony are not entirely persuasive. The ALJ's first factor does not

1 constitute a clear and convincing reason to discount plaintiff's
2 credibility, because it is germane to most claimants. Put differently,
3 absent, for example, testimony from a percipient witness, it would be
4 difficult for most claimants to "objectively verify" their daily
5 activities. Moreover, "the entire purpose of a credibility analysis is
6 to assess a claimant's testimony as to matters that are not otherwise
7 easily verifiable." Gounder v. Astrue, 2013 U.S. Dist. LEXIS 12710, at
8 *7 (C.D. Cal. Jan. 29, 2013). With respect to the ALJ's second factor,
9 it appears that the ALJ is merely reasserting his initial reason for
10 discrediting plaintiff -- *to wit*, that the medical evidence does not
11 support plaintiff's claims of disability -- but, as noted *supra*, this is
12 not, by itself, a clear and convincing reason for discounting
13 plaintiff's credibility.

14
15 The Court finds, however, that the ALJ's error in relying on the
16 above-noted invalid reason(s) was harmless, because the ALJ's other
17 reasons are supported by substantial evidence. See Carmickle, 533 F.3d
18 at 1162-63 (holding that ALJ's reliance on two invalid reasons in
19 support of adverse credibility determination was harmless where
20 remaining reasons were adequately supported by substantial evidence).
21 The Court therefore finds and concludes that reversal is not warranted
22 based on the ALJ's alleged failure to consider plaintiff's subjective
23 symptom testimony properly.

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CONCLUSION

For the foregoing reasons, the Court finds that the Commissioner's decision is supported by substantial evidence and is free from material legal error. Neither reversal of the Commissioner's decision nor remand is warranted.

Accordingly, IT IS ORDERED that Judgment shall be entered affirming the decision of the Commissioner of the Social Security Administration. IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for the Commissioner.

DATED: September 3, 2013

Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE